Supreme Court, U. S.
FILED
AUG 1 1975
MICHAEL RODAK, JR., CLERK

No. 75-176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

HOUSTON ENDOWMENT INC.,

Petitioner

v.

JOHN T. DUNLOP,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Houston Endowment Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 26, 1975.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit entered on March 26, 1975, (Appendix A) is not to be reported. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing and

Petition for Rehearing En Banc (Appendix B) was entered on May 5, 1975. The Opinion (Appendix C) and Judgment (Appendix D) of the United States District Court for the Southern District of Texas, Houston Division, were entered January 29, 1974 and March 25, 1974, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 26, 1975. A timely Petition for Rehearing and for Rehearing En Banc was denied on May 5, 1975, and this Application for Certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C.A. § § 201 *et seq.*, are applicable where:

   a. The Court finds that the jobs of male and female employees are substantially different for a substantial portion of time; and

   b. The Secretary of Labor looks behind Petitioner's bona fide job evaluation which he admits to be reasonable, rejects Petitioner's evaluation and substitutes his own.

2. Whether due process of law is denied by the issuance of an injunction which:

   a. Fails to describe in reasonable detail the act or acts to be enjoined, thus failing to set out fairly what conduct is forbidden, thereby leaving Petitioner open

to the hazard of conducting business in the mistaken belief that its actions are not prohibited by the injunction and later finding itself subject to punishment for contempt; and

   b. Is far broader in scope than the issues litigated, thus placing Petitioner in jeopardy of being punished for contempt of court for having made, in good faith, reasonable job classifications concerning which there has been no prior court determination that its conduct is or may be in violation of the law.

3. Whether due process of law is denied by the Trial Court's having prepared a written Opinion prior to Petitioner's opening its case, which Opinion granted judgment for the Secretary and recited that Petitioner had failed to meet its burden of proof, or, alternatively, whether such action by the Trial Court was so injudicious as to require the exercise of the supervisory power of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment Five (Appendix E).

STATUTORY PROVISIONS INVOLVED

29 U.S.C.A. § 206 (d) (1) (Appendix F).
29 U.S.C.A. § 215 (a) (2) (Appendix G).
29 U.S.C.A. § 217 (Appendix H).

RULES INVOLVED

Rule 65(d), Federal Rules of Civil Procedure (Appendix I).

STATEMENT OF THE CASE

This is an Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review that Court's affirmance of a Judgment of the United States District Court for the Southern District of Texas, Houston Division, entered March 26, 1974, in favor of the Secretary of Labor in the principal amount of $20,558.20, together with interest, which Judgment also provides certain injunctive relief.

This suit was filed in the United States District Court for the Southern District of Texas, Houston Division, on May 19, 1972, by James H. Hodgson, then Secretary of Labor. Jurisdiction of the Court was based upon Section 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (hereinafter called the "Act").

The case was called to trial on January 18, 1974, before the Honorable Carl O. Bue. Trial was recessed on the afternoon of January 18, and reconvened on January 22, 1974. The afternoon session on January 22 began at 2:00 P.M. Tr. 306. Evidence was taken until 3:30 P.M., at which time the Court recessed for fifteen (15) minutes. Shortly thereafter, the Secretary rested his case, having presented the testimony of 16 witnesses. Petitioner opened its case at approximately 4:00 P.M., presented testimony of two witnesses, Mr. Randolph C. Lorio (Building Manager of the buildings in question) and Morino Pina, a former employee, and then rested its case. Tr. 391. The Court allowed brief oral argument, and, immediately at the conclusion of such arguments, announced its decision and read a written opinion (Tr. 400-406) which is almost identical to the Memorandum and Opinion finally entered in this case. Appendix C. Since Petitioner opened its case after

the final recess of the day, the written opinion read by the Court from the bench, in which the Court recited that Petitioner had failed to meet its burden of proof, must, of necessity, have been written *prior* to the time that the Petitioner opened its case.

There is no material dispute in this lawsuit that at all pertinent times the Petitioner classified its custodial employees as performing either "heavy custodial work" or "light housekeeping work." Those employees performing "heavy custodial work" were paid 10¢ an hour more than those performing "light housekeeping work." It is also undisputed that the majority of custodial employees performing "heavy custodial work" were male employees, while the majority of employees performing "light housekeeping work" were female employees. The "heavy custodial" category included workers employed as freight elevator operators, security guards, day custodial personnel, and evening custodial personnel. The "light housekeeping" category included elevator operators and day and evening custodial personnel. Although Defendant originally contended that female elevator operators and female day custodial personnel were entitled to the higher pay rate, Defendant abandoned its claim as to these employees at trial and claimed only that female evening custodial personnel in the light housekeeping category were entitled to the same pay as those in the heavy custodial work category. For purposes of brevity, the male and female evening custodial workers are hereinafter sometimes called "janitors" and "janitresses," respectively.

The Secretary contended that the Endowment was and is required to pay all its janitors and janitresses at the higher rate because the "heavy custodial work" and the "light housekeeping work" require substantially equal

skill, effort, and responsibility, and are performed under similar working conditions. However, it was undisputed and the Trial Court found that the "heavy custodial work" performed by janitors and the "light housekeeping work" performed by janitresses involved work which was substantially dissimilar for substantial portions of time. Specifically, the Trial Court found that the "...men assigned to janitorial duties in each of the buildings at issue *generally performed work assignments which were different in nature from those performed by women....*," Appendix C, p. C-3, and that "*... the men regularly spent a substantial portion of their time performing a type of janitorial work which was not identical to the type of janitorial work which occupied a substantial portion of the women's time.*" Appendix C, p. C-6 (emphasis added).

In spite of these threshhold findings, the Trial Court found and the Appellate Court affirmed that the Act was applicable. Having so found, the Trial Court entered and the Appellate Court affirmed the following injunction:

> "Defendant shall not, contrary to the provisions of sections 6(d) (1) and 15(a) (2) of the Act, discriminate within establishments in which employees are employed between employees on the basis of sex by paying wages to employees employed in the same establishments at rates less than the rates at which it pays employees of the opposite sex in such establishments for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Appendix D, p. D-2.

In view of the issues and evidence presented at trial, relating *solely* to evening custodial employees, the injunctive relief granted by the Court does not comply with the provisions of Rule 65(d), Federal Rules of Civil Procedure ("F.R.C.P."), which states that

> [e]very order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained....

The form of the injunctive relief granted by the Trial Court herein does nothing more than follow the language of the Act, and it wholly fails to provide the necessary notice and guidance to Petitioner which is required by Rule 65(d), F.R.C.P. Further, due to its breadth and vagueness, it denies Petitioner due process by, among other things, unfairly subjecting the Petitioner to possible contempt proceedings in the future in connection with *any* job classification in *any* establishment in which it has employees, without affording the Petitioner a fair opportunity to receive a judicial determination that its conduct is or may be in violation of the Act.

REASONS FOR GRANTING THE WRIT

THE JUDGMENT AFFIRMED BELOW PERMITS THE SECRETARY, CONTRARY TO THE INTENT OF THE ACT, TO GO BEHIND BONA FIDE JOB EVALUATIONS AND REQUIRE EQUAL PAY FOR HISTORICALLY UNEQUAL WORK.

In *Corning Glass Works* v. *Brennan*, ... U.S. ..., 41 L.Ed. 2d 1, 94 S. Ct. .... (1974), this Court considered the applicability of the Act in light of its history, recognizing that Congressional intent, as revealed by that history, was to insure "that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act." 41 L.Ed. 2d at 13.

In this case, even the Secretary's Compliance Specialist admitted that Petitioner's job evaluation was reasonable. At trial, when asked if, based on his interviews, he felt

there was a "reasonable basis" to argue that the jobs were or were not equal, he responded emphatically, "Certainly." Tr. 336, l. 22-Tr. 337, l. 3. When asked if he felt "that there was a reasonable basis for people differing in opinion as to which one was the more difficult job," he gave the same emphatic answer. Tr. 340, l. 6-9.

This Court has correctly discerned the intent of Congress, as expressed by Representative Goodell, a key sponsor of the Act, that:

> *"If he [the employer] has a reasonable standard of differentiation, the Labor Department is not to come in, even, and judge the reasonableness or unreasonableness of this differentiation among employees,* except as it shows a clear pattern of discrimination against sex." (Emphasis added). 109 Cong. Rec. 9208 (1963).

Representative Griffin added:

> "I should like to focus the attention of the gentlemen upon small roman numeral iv, at the top of page 3 which makes clear and explicitly states that *a differential based on any factor or factors other than sex would not violate this legislation. In other words, even though jobs involve the same skill, equal effort, equal responsibility, and are performed under the same working conditions, if there is any other factor not based on sex upon which a differential is based, then no violation of this law can be found.*" (Emphasis added) 109 Cong. Rec. 9203 (1963) (Rep. Griffin, R., Mich.)

Therefore, when, as here, an employer has a reasonable basis for its classification, it is clearly erroneous for either the Secretary or the Trial Court to arbitrarily substitute its judgment for that of the employer.

In *Corning, supra,* this Court said:

> Significantly, it is not the Secretary in this case who is trying to look behind Corning's bona fide job evaluation system to require equal pay for jobs which Corning has historically viewed as unequal work. . . . . U.S. . . . . , 41 L.Ed. 2d at 15.

It is precisely that question which is now squarely before this Court and which needs this Court's resolution, not merely for the guidance of the parties here involved, but also for the guidance of all who will be concerned with the applicability of the Act in the future.

II.

THE JUDGMENT AFFIRMED BELOW CONFLICTS WITH THE OPINIONS OF OTHER COURTS OF APPEALS WITH RESPECT TO THE APPLICABILITY OF THE ACT.

As noted above, the judgment affirmed below held that the Act was applicable even though the Trial Court found that the men spent substantial portions of time performing tasks substantially different from those performed by women, and it was undisputed that the employers classification was reasonable.

The Court of Appeals for the Seventh Circuit has rejected the application of the Act under such circumstances. In *Hodgson* v. *Miller Brewing Co.,* 457 F.2d 221 (7th Cir., 1972) the Seventh Circuit stated:

> We agree that the Equal Pay Act does not authorize courts to equalize wages merely because they find that two substantially different jobs are worth the same monetarily to the employer and therefore should be paid the same wages. 457 F.2d at 227.

The Third Circuit Court of Appeals said in *Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir.), *cert. denied*, 398 U.S. 905 (1970).

> [4] *Differences in job classifications were in general expected to be beyond the coverage of the Equal Pay Act.* This was because in the case of genuine job classifications the differences in work necessarily would be substantial and the differences in compensation therefore would be based on the differences in work which justified them. 421 F.2d at 265 (emphasis added).

The erroneous application of the Act in this case resulted from both courts overlooking the effect of important facts either found by the Trial Court or undisputed in the evidence, *i.e.*,

(1) The type of work done by the men is different in nature from the type of work done by the women;

(2) These "different in nature" work assignments occupy a substantial portion of the men's time; and

(3) The undisputed testimony of Plaintiff's own "compliance specialist" that Petitioner had a reasonable basis for its classification of duties and for the wage differential based thereon.

Under the law, the standard of "equal work" does not become relevant until it is first proved that the work is "substantially identical." In this case, not only did the trial court not find that the work was "substantially identical," it found that the ". . . men assigned to janitorial duties in each of the buildings at issue generally performed *work assignments which were different in nature from those performed by women. . . ,*" Appendix C. p. C-3, and that "*. . . the men regularly spent a substantial portion of their time performing a type of janitorial work which was not identical to the type of janitorial work which occupied a substantial portion of the women's time.*" Appendix C, p. C-6 (emphasis added).

The Courts below then further confused the matter by accepting the premise that the Act is applicable when unskilled workers in the same department (cleaning personnel) mesh routine tasks requiring substantially equal skill, effort and responsibility to accomplish a common objective. The fallacy of this premise is that it assumes as true the very matter to be proved, *i.e,* the applicability of the Act's standards to all different types of janitorial tasks.

Is the Act applicable to all unskilled janitorial personnel who mesh routine tasks to accomplish a common objective? The answer must be "no" for the following reasons:

(1) this premise assumes that all "routine unskilled" tasks in the same department must be substantially identical;

(2) this premise assumes that job objective, not job content, is controlling; and

(3) this premise assumes that wage differentiation between unskilled workers performing routine work assignments in the same department must be based only on sex and can have no rational basis.

Each of these assumptions is invalid!

First, Plaintiff's position assumes that all work assignments performed in the same department must be "substantially identical" because they are "closely related." This novel position is directly contrary to the Regulations promulgated by the Secretary pursuant to the Act. In 29 C.F.R. § 800.121, "Job Content Controlling," Appendix J.,

p. J-1, the inapplicability of the Act to circumstances strikingly similar to this case is clearly illustrated. The employees hypothecated in the Regulation are both stock clerks assigned to the same department who, in the words of the Trial Court, "meshed their duties in accomplishing a common objective," Appendix C, p. C-5, *i. e.*, assuring the ready availability of merchandise for sale to the public. However, there was a difference in job assignments. One stock clerk was primarily concerned with checking inventory while another of the opposite sex was primarily concerned with carrying inventory. In spite of being unskilled personnel assigned to the same department who meshed routine tasks to accomplish a common objective, the Regulation states:

> Clearly, the equal pay standard would not apply where jobs require such substantially different duties, even though the job titles are identical. 29 C.F.R. §800.121. Appendix J, p. J-1.

Second, this theory makes job objective, not job content, controlling. The facts that the work of the janitors and janitresses was of a different nature for a substantial portion of time and that the Endowment had a reasonable basis for its job classification must be totally ignored to apply the Act merely because all workers had a common objective — getting the building ready for the next business day. To thus ignore job content and to urge applicability of the Act because the workers have a common objective, the Secretary must reject his own Regulations. The result is to impose upon the Petitioner burdens which the Act does not impose upon any and the Secretary does not impose upon all!

Third, it is undisputed that the Endowment had a reasonable basis for its classification and the wage differen-

tial based thereon. Plaintiff's "compliance specialist" so testified! Tr. 336, l. 22-Tr. 337, l. 3; Tr. 340 l. 6-9. Since it is obvious that the Secretary's "Compliance Specialist" would not consider a distinction based only on sex "reasonable," the only conclusion which can be drawn from such testimony is that the Petitioner's classification was reasonable based upon factors other than sex.

III.

THE INJUNCTION GRANTED AND AFFIRMED BELOW RAISES SIGNIFICANT AND RECURRING QUESTIONS CONCERNING THE PERMISSIBLE SCOPE AND REQUIRED SPECIFICITY OF INJUNCTIVE RELIEF.

The injunction granted and affirmed below reads:

> "Defendant shall not, contrary to the provisions of sections 6(d) (1) and 15(a) (2) of the Act, discriminate within establishments in which employees are employed between employees on the basis of sex by paying wages to employees employed in the same establishments at rates less than the rates at which it pays employees of the opposite sex in such establishments for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Appendix D, p. D-2.

The scope of this injunction not only denies Petitioner due process of law by being vague and indefinite, but also denies Petitioner due process by applying to issues beyond the scope of the litigation. The injunction should have been limited to the establishments and to the class of employees involved in the litigation. Failure to do so exposes Petitioner to punishment for contempt in a situation where, as here, it has made an admittedly reasonable classification of its work assignments and based a wage

differential thereon, which reasonable classification is later rejected by the Secretary and by the Court. Such a concept is surely shocking to the conscience.

In view of the issues and evidence presented at trial, relating *solely* to evening custodial employees, the injunctive relief granted by the Court does not comply with the provisions of Rule 65(d), F.R.C.P., which states that:

> Every order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ,

nor does it comply with the construction of that Rule by this Court, which has held on numerous occasions that a statute cannot be made the basis of contempt proceedings merely by incorporating either a reference to the statute or the language of the statute into an Order of the Court. *See, e.g., National Labor Relations Bd.* v. *Express Pub. Co.,* 312 U.S. 426, 435-36; 85 L.Ed. 930, 936-37, 61 S. Ct. 693 (1941). Yet that is precisely what has been done in this instance. The injunction merely engrafts a portion of the statute in gross and uses the statutory language as a substantive command. It does not use the statute to show the authority "pursuant" to which the injunction is issued or to "define" the Acts prohibited.

While it is true that this Court has held that under some circumstances, *e.g.,* a demonstrated propensity to violate the law, *McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187, 93 L.Ed. 599 (1949), a broad injunction may be justified, neither this nor any other circumstance justifying such vague and sweeping injunctive relief is present here.

First, all parties agreed and the Trial Court found that there was no willful violation of the Act. Therefore, no propensity to violate the Act has been demonstrated.

Second, some broad injunctions do not place significant risks of violations on an employer because they require acts that are merely ministerial, such as the keeping of records, or require little or no exercise of discretion on the part of the party enjoined. *See, e.g., Gulf King Shrimp Company* v. *Wirtz,* 407 F.2d 508 (5th Cir., 1969) (enjoined "oppressive child labor" as defined in the Act, which requires only a determination of the age of the employee, the presence or absence of a determination by the Secretary of Labor that an occupation is particularly hazardous or detrimental to their health and well-being, the presence or absence in the employer's file of an unexpired certificate from the Secretary of Labor that the employee is above the oppressive child-labor age, or the contents of a Regulation or Order by the Secretary of Labor for industries other than mining or manufacturing governing the extent to which children may be employed in such industries).

Third, chain-wide injunctions have been issued in cases where a policy of discrimination has been found which extends beyond the plants or establishments in issue, and denied where no such showing was made. *Brennan* v. *J. M. Fields, Inc.,* 488 F.2d 443 (5th Cir., 1974); *Hodgson* v. *Corning Glass Works,* 474 F.2d 226 (2nd Cir., 1973); *Hodgson* v. *American Can Co.,* 440 F.2d 916 (8th Cir., 1971).

Fourth, injunctions limited to a particular class of employees have been broadened to include all employees where the record contained evidence that the discrimination was not limited to the area of employment to which the injunction was limited. *Hodgson* v. *First Fed. Sav. & L. Assn. of Broward Co., Fla.,* 455 F.2d 818 (5th Cir., 1972).

This case falls into none of these categories. The Secretary admitted that Petitioner did not willfully violate the Act. The Court found no evidence of willful violation. Appendix C, p. C-7. The injunction issued by the Court

below requires more than mere record keeping and the exercise of minimal discretion. In fact, it places upon Petitioner the risk of evaluating job categories not litigated, making a good faith reasonable classification and basing a wage differential thereon, and then being held in contempt for violation of the injunction if the Secretary of Labor rejects Petitioner's reasonable classification, substitutes his evaluation for that of the Petitioner, and the Court agrees with the Secretary.

It is not sufficient to say that Petitioner can seek a clarification of the injunction. A proposed judgment clarifying the injunction by limiting it to the class of employees whose work assignments were litigated was submitted to the Trial Court, which refused it. The need for guidance from this Court as to the permissible scope and required specificity of injunctive relief is highlighted because of the increasing use of such relief to enforce both court and administrative edicts. To be strict in exacting obedience while being indefinite in the command to be obeyed is surely something which the mind attuned to Constitutional due process cannot tolerate!

IV.

THE INJUNCTION GRANTED AND AFFIRMED BELOW IS CONTRARY TO THE RULINGS OF OTHER CIRCUIT COURTS OF APPEAL.

The willingness of the United States Court of Appeals for the Fifth Circuit to affirm such a broad and vague injunction places it at variance with other Courts of Appeals. The Tenth Circuit has described as overly broad an injunction which exposes a party to the hazards to which Petitioner is exposed by the injunction granted below.

> An injunction is overly broad which leaves parties "open to the hazard of conducting business in the mistaken belief that it is not prohibited by the injunction

> and later finding themselves subject to punishment for contempt." *B & C Truck Leasing Inc.* v. *I.C.C.* 10th Cir. 1960, 283 F.2d. 163, 167. It is, of course, well accepted that an injunction must be worded in such specific terms and with such detail as to put the party enjoined on notice of precisely what he is called upon to do or refrain from doing. *Williams* v. *United States,* 10th Cir. 1967, 402 F.2d 47, 48. *Sheila's Shine Products, Inc.* v. *Sheila Shine, Inc.,* 486 F.2d. 114, 129 (10th Cir., 1973).

The Second Circuit in *Hodgson* v. *Corning Glass Works,* 474 F.2d 226 (2nd Cir., 1973) *aff'd,* ..... U.S. ....., 21 L.Ed.2d 1 (1974), aligned itself with the Tenth and Eighth Circuits and, more importantly, with this Court:

> We agree with the point made by the Eighth Circuit, in another Equal Pay Act case, *Hodgson* v. *American Can Co.,* 440 F.2d 916, 921 (1971), that absent a showing of a policy of discrimination which extends beyond the plants at issue here, there is no basis for a nationwide injunction. Moreover, the Supreme Court has held that "the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he should at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *NLRB* v. *Express Publishing Co.,* 312 U.S. 426, 435-436, 61 S.Ct. 693, 699, 85 L.Ed. 930 (1941). Since there is no showing here of the "proclivity for unlawful conduct" or "record of continuing and persistent violations of the Act" found to justify such an injunction in *McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187, 192, 69 S.Ct. 497, 500, 93 L.Ed. 599 (1949), the injunction must be narrowed accordingly. 474 F.2d. at 236, 237.

Measured by these principles, the injunction entered against Petitioner would be found constitutionally defec-

tive in the Second, Eighth and Tenth Circuits. It is of great importance that the Constitution of the United States be applied evenly among the States. To insure such, this Court should grant this Petition and require that the injunction be narrowed.

V.

THE ACTION OF THE TRIAL COURT WAS SO INJUDICIOUS AS TO DENY PETITIONER DUE PROCESS OF LAW AND TO REQUIRE THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

As pointed out in the Statement of the Case, at the conclusion of the trial the Court read a prepared written Opinion. Since there was no recess from the time Petitioner commenced presentation of its case until the reading of this Opinion by the Trial Court, the written Opinion must necessarily have been written *prior* to the time that Petitioner opened its case. This Opinion, written *prior* to the opening of Petitioner's case, contains the following statements:

> This Court is also satisfied that the *defendant has not met his burden of showing legal justification for the disparity.* Tr. 401, l. 13-15.
>
> In this Court's opinion *defendant has not met its burden by showing any objective evidence* that the duties performed by men as a class required greater effort during a significant amount of time than that performed by women as a class, thus justifying any wage differential. Tr. 403, l. 9-15.
>
> *This Court concludes that the defendant has shown no justification in law or in fact for* the disparity of the hourly rates paid men and women employees doing custodial work, and the Court therefore finds for the Plaintiff. Tr. 404, l. 11-15 (emphasis added).

It is with some reluctance that counsel for Petitioner complains of this conduct by the Trial Court. However, counsel cannot overlook or neglect his overriding duty and obligation to his client, and to our system of justice, both of which have been abused in these proceedings by the conduct of the Trial Court. At the very least, the conduct of the Trial Court has cast a shadow upon the fairness of these proceedings which can be dispelled only by a new trial.

When due process is denied in this fashion, there is no recourse but to this Honorable Court. For the benefit of all who come before the bench to be judged, and for the benefit of all those who have been elevated to the bench to judge, this Court should make clear that it will tolerate nothing less than an open mind until both sides have rested and closed.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectively submitted,

By .....

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(713) 223-4151
Attorney for Petitioner
Houston Endowment Inc.

July, 1975

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been served upon the Solicitor General and upon Respondent's attorney of record as provided by Rule 33(1) and (2)(a), Supreme Court Rules, by mailing same on July , 1975, to each at the following addresses:

1. Solicitor General
   Department of Justice
   Washington, D.C. 20530

2. Mr. Donald S. Shire
   Office of the Solicitor
   United States Department of Labor
   Room 4141 Main Labor
   14th and Constitution Ave., N.W.
   Washington, D.C. 20210

   Attorney for Appellee John T.
   Dunlop, Secretary of Labor
   United States Department of Labor

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Glen E. Clover

APPENDICES

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APPENDIX A: Opinion of the United States Court of Appeals for the Fifth Circuit, No. 74-2011, *John T. Dunlop, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee,* v. *Houston Endowment Inc., et al., Defendants-Appellants,* dated March 26, 1975, issued as Mandate A-1

APPENDIX B: Notice of entry of Order of the United States Supreme Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Petition for Rehearing En Banc of Defendant-Appellant, No. 74-2011, *John T. Dunlop, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee* vs. *Houston Endowment Inc., Defendant-Appellant,* dated May 5, 1975 ..... B-1

APPENDIX C: Opinion and Memorandum of the United States District Court for the Southern District of Texas, Houston Division, by the Honorable Carl O. Bue, No. 72-H-672, *Peter J. Brennan, Secretary of Labor, United States Department of Labor, Plaintiff,* vs. *Houston Endowment Inc. and Realty Management Company, Defendants,* dated January 29, 1974 ..... C-1

APPENDIX D: Judgment of the United States District Court for the Southern District of Texas, Houston Division, by the Honorable Carl O. Bue, No. 72-H-672, *Peter J. Brennan, Secretary of Labor, United States Department of Labor, Plaintiff* v. *Houston Endowment Inc. and Realty Management Company, Defendants,* entered March 25, 1974 ..... D-1

APPENDIX E: Fifth Amendment to the Constitution of the United States of America E-1

APPENDIX F: Fair Labor Standards Act, Title 29, United States Code, § 206(d)(1) F-1

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APPENDIX A

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 74-2011

DO NOT PUBLISH

JOHN T. DUNLOP
SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR
Plaintiff-Appellee,

v.

HOUSTON ENDOWMENT, INC., ET AL.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(March 26, 1975)

Before GOLDBERG, RONEY, Circuit Judges, and GROOMS, District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Costs are taxed against the defendants-appellants.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

Issued as Mandate: May 13, 1975.

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK
600 Camp Street
New Orleans, La. 70130

May 5, 1975

EDWARD W. WADSWORTH, CLERK

TO ALL COUNSEL OF RECORD:

No. 74-2011

JOHN T. DUNLOP, ETC.
vs.
HOUSTON ENDOWMENT, INC., ET. AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By .....
Deputy Clerk

cc: Messrs. Glen E. Clover
Jess Hall
Ms. Carin Ann Clauss
Mr. Donald Shire
Ms. Melanie Franco Nussdorf
Messrs. Richard L. Collier
M. J. Parmenter
Ms. Joan T. Winn

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 72-H-672

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

v.

HOUSTON ENDOWMENT, INC., AND
REALTY MANAGEMENT COMPANY,
Defendants

RICHARD L. COLLIER, OFFICE OF THE SOLICITOR,
U.S. DEPARTMENT OF LABOR, DALLAS, TEXAS,
FOR PLAINTIFF.

GLEN E. CLOVER, LIDDELL, SAPP, ZIVLEY & BROWN,
HOUSTON, TEXAS, FOR DEFENDANTS.

MEMORANDUM AND OPINION

This cause of action was brought by Peter J. Brennan, Successor in Office to James D. Hodgson, as Secretary of Labor, United States Department of Labor. The defendant Houston Endowment, Inc., is a corporation organized and existing under the laws of the State of Texas with its principal office and place of business in the City of Houston, Harris County, Texas. At all times material hereto defendant has owned, managed and operated the following office buildings known as:

Bankers Mortgage Building
708 Main Street
Houston, Texas

1114 Texas Avenue Building
1114 Texas Avenue
Houston, Texas

C & I Life Building
1006 Main Street
Houston, Texas

The defendant also owned, managed and operated the office building known as the Houston Bar Center Building, located at 723 Main Street, Houston, Texas, from January 2, 1948, to January 31, 1972. The defendant at all times material hereto has been engaged in related activities performed through unified operations or common control for a common business purpose. The defendant realized an annual gross volume of sales made or business done in excess of $250,000 for each of the years 1970, 1971, 1972 and 1973. At all times since May 19, 1970, the defendant has employed numerous employees in Houston, Texas. At trial it was admitted by defendant that at all times since May 19, 1970, it has employed numerous employees in Houston, Texas, at least two of whom were engaged in such activities as operating and directing elevators, carrying mailmen in elevators who are carrying the United States mail, preparing and receiving correspondence to and from places located outside of the State, and handling and working with goods such as cleaning compounds, glass and toilet paper originally produced outside of the State of Texas.

In light of the foregoing, the Court concludes that the defendant Houston Endowment, Inc., for purposes of this suit, at all times since May, 1970, has constituted an enterprise engaged in commerce and the production of goods for commerce as defined in Sections 3(r) and 3(s)(1) of

the Fair Labor Standards Act of 1938 (hereinafter referred to as the Act), 29 U.S.C. §§ 203(r), 203(s)(1). *Brennan* v. *Dillion,* 483 F.2d 1334 (10th Cir. 1973); *Shultz* v. *Wilson Building, Inc.,* 478 F.2d 1090 (5th Cir. 1973); *Shultz* v. *Travis Edwards, Inc.,* 465 F.2d 1050 (5th Cir. 1972), *cert. denied,* 409 U.S. 1076. This Court has jurisdiction over this cause of action. Since, however, no evidence has been adduced as to the defendant, Realty Management Company, the said defendant is hereby dismissed from this action.

With respect to the merits of this lawsuit, this Court has listened attentively to each of the witnesses, given particular attention to their credibility, studied the legal authorities submitted and carefully considered the arguments presented by counsel. The evidence has shown a definite pattern whereby men assigned to janitorial duties in each of the buildings at issue generally performed work assignments which were different in nature from those performed by women, but were substantially equal in terms of skill, effort and responsibility. The men frequently operated one or more motor-driven machines, such as floor buffers, wet vacuums, or carpet pile lifters. Women consistently did not do so except for vacuum cleaners, although there was some testimony that one woman used a pile lifter with some unspecified frequency. Another woman testified that she regularly used a floor buffer similar to those described in this trial, although it was at another location not owned or operated by the defendant. Men were regularly assigned to those duties requiring use of the machines, such as floor scrubbing, waxing and polishing and also carpet shampooing. Men usually did those chores requiring use of a step-ladder, such as the changing of light bulbs. One man cleaned the men's restrooms and wet-mopped all

bathrooms. Women were usually assigned to office cleaning tasks such as dusting, cleaning, removing trash, vacuuming, tile scrubbing, spot cleaning of walls and carpets, cleaning venetian blinds and related duties. In some areas of work assignments there was substantial overlap, as both men and women were assigned to vacuuming duties on a regular basis. Both cleaned bathrooms, although the men did the mopping, and men occasionally cleaned venetian blinds. Women were reported to have been given the opportunity at one of the buildings to work on the scrubcrew without any takers; to the contrary, there was testimony from at least one of the women that she would go to work on the scrubcrew if given the opportunity, in order to benefit from the pay differential.

There was no probative evidence presented that defendant had considered any of the duties regularly assigned to men in an effort to determine comparative differences, if any, with respect to the amount of skill, effort, or responsibility required. There was no probative evidence forthcoming that any effort had been made to determine whether or not any given female janitorial applicant or employee was capable of doing any particular job. Similarly, there was no probative evidence that male applicants or employees were screened for any particular duties. The evidence was clear that at all material times men consistently received $0.10 per hour more than women, regardless of th work assignment involved.

The Court is fully aware that the law requires substantially identical or substantially equal work and that mere comparability is not enough. *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238-39 (5th Cir. 1973). This Court is satisfied that the Secretary has met his burden of proof in showing the degree of equality of work and inequality of pay necessary to shift the burden of proof to the defendant.

This Court is also satisfied that the defendant has not met its burden of showing legal justification for the disparity.

It should first be noted that any work assignment bearing a higher wager which includes no women carries the stigma of suspect validity. See *Hodgson* v. *Behrens Drug Co.*, 475 F.2d 1041, 1048 (5th Cir. 1973); *Shultz* v. *First Victoria National Bank,* 420 F.2d 648, 659 (5th Cir. 1969). Similarly, any wage differential which might be justified may be applied only to those persons, male or female, who are individually unable or unwilling to do that work to which the higher wage is attributable. *See Schultz* v. *Wheaton Glass Co.,* 421 F.2d 259, 264 (3d Cir. 1970), *cert. denied,* 398 U.S. 905. Each employee must be afforded a reasonable opportunity to demonstrate his or her ability to perform the allegedly more strenuous job on a regular basis. *See Krumbeck* v. *John Oster Manufacturing Co.,* 313 F. Supp. 257, 262 (E.D. Wis. 1970).

The Court has considered the testimony of the witnesses as to the work performed by each and their estimates of the skill and effort involved. The evidence indicates that both men and women performed duties of essentially equal responsibility. This Court must look to the reasonable pattern of the work involved, the daily cleaning of offices in which men and women meshed their duties in accomplishing a common objective. The skill required of the men and boys who operated the various power-operated machinery appears to this Court to be no greater than the skill required of women in vacuuming and cleaning venetian blinds with the proper tools. The sole difference appears to be one of exposure, experience and familiarity with the equipment. As the evidence showed, most of the women were not exposed to most of the types of machines. This lack of exposure, controlled by defendant, does not warrant any wage differential.

Judging by the interrogation of the witnesses and arguments of counsel, most of this dispute centers around the efforts required of men and women in performing their jobs and whether or not such efforts were substantially equal. Considering the evidence as a whole, the Court is satisfied that the use by men of power-driven equipment requires no more effort, as a whole, than the amount of effort expended by women on their duties. The Court heard much testimony regarding the comparative efforts expended in using wet mops versus dry mops, in pushing mop buckets on coasters versus pushing trash containers on wheels, and on a variety of like duties. In this Court's considered opinion the defendant has not met his burden by showing any objective evidence that the duties performed by men as a class required greater effort over a significant period of time than that performed by women as a class so as to justify any wage differential.

The sole issue thus becomes, in this Court's opinion, whether the Act applies to the circumstances here shown in which the men regularly spent a substantial portion of their time performing a type of janitorial work which was not identical to the type of janitorial work which occupied a substantial portion of the women's time. This Court concludes that it does. Differences in jobs or duties, if substantially similar, may still be considered to be equal work in appropriate circumstances. *Cf. Hodgson v. American Bank of Commerce,* 447 F.2d 416, 419 n.3 (5th Cir. 1971). Similarly, differences or dissimilarities may be ignored, unless they somehow explain the pay differential. *Cf. Hodgson v. Brookhaven General Hospital,* 436 F.2d 719, 723 & n.3 (5th Cir. 1970). As the Secretary's Regulations point out, the Act may be applicable to jobs requiring equal skill, effort and responsibility, even though the actual

duties may involve different products, machines, equipment, or locations within the establishment. See 29 CFR §§ 800.121 to 800.123. Such regulations, although not binding, are entitled to great deference. The presumption is that they are valid unless shown to be erroneously in conflict with the Act itself. *See Griggs* v. *Duke Power Company,* 401 U.S. 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158, 165 (1971); *Brennan* v. *City Stores, Inc.,* 479 F.2d 235, 240 (5th Cir. 1973).

This Court concludes that the defendant has shown no valid justification in law or in fact for the disparity of hourly rates paid to men and women employees doing custodial work. The Court therefore finds for the plaintiff. The record reveals no evidence that employer's discrimination against women was willful; therefore, the Court concludes that the two-year Statute of Limitations is applicable.

The Court has considered carefully the nature of the case and has concluded that violations of the Equal Pay Act have been shown and that the remedy for the differential payment was not limited to an action brought under Title VII. *See Hodgson* v. *Golden Isles Convalescent Homes, Inc.,* 468 F.2d 1256 (5th Cir. 1972). Title VII does overlap the coverage of the Equal Pay Act, as both apply to disparate wages. *Schultz* v. *First Victoria National Bank,* 420 F.2d 648, 659 n.26 (1969). Furthermore, Title VII and the Act should be harmonized. *Hodgson* v. *Brookhaven General Hospital,* 436 F.2d 719, 727 (5th Cir. 1970). The facts shown in this case do not indicate that the janitors performed any additional functions, labor, effort, skill or responsibilities when their duties are compared with those of the janitresses. Under these circumstances, the question does not arise as to whether a classification

reserved to men which receives extra compensation for extra work should be open to women, a Title VII issue; the question is whether women should receive equal pay for equal work. This latter issue has been properly brought under the Equal Pay Act.

The remaining issue pertains to the applicability of an injunction. In determining whether an injunction should issue in a Fair Labor Standards Act case, the district court should consider such factors as employer's previous actions of non-compliance, the moral and business responsibility of the employer, the promises of future compliance and whether the defendant's litigious contention is the legitimate good faith quest for legal determination or is the mere pretense to thwart effective compliance with the Act. *Godberg* v. *Cockrell,* 303 F.2d 811, 813 (5th Cir. 1962); *Mitchell* v. *Hausman,* 261 F.2d 778, 780 (5th Cir. 1958). The probability of future compliance is a decisive factor in the decision to grant an injunction against future violations. *Wirtz* v. *Atlas Roofing Manufacturing Co.,* 377 F.2d 112 (5th Cir. 1967). However, since an injunction does no more than require that the law be followed, the minimal inconvenience to the employer, balanced against the difficulties of enforcing the Act to the public benefit, argues strongly for issuance of an injunction in this type of case. *Shultz* v. *Parke,* 413 F.2d 1364, 1368 (5th Cir. 1969). Under the circumstances, the Court believes it appropriate that an injunction should issue.

This Court now directs the parties to confer with respect to damages under the Act in an effort to reach a mutual agreement as to amount. An appropriate judgment and order of injunction should be submitted to the Court within thirty (30) days.

DONE at Houston, Texas, this 29th day of January, 1974.

Carl O. Bue, Jr.
United States District Judge

APPENDIX D

United States District Court

SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action
No. 72-H-672

PETER J. BRENNAN,
SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

HOUSTON ENDOWMENT, INC. and
REALTY MANAGEMENT COMPANY,
Defendants.

JUDGMENT

This case came duly on for hearing before the Court sitting without a Jury, and the Court, after hearing the evidence, the arguments of counsel, and being fully advised in the premises makes and enters the following Judgment in accordance with the Memorandum and Opinion entered on January 29, 1974:

It is hereby ORDERED, ADJUDGED, and DECREED that defendant Houston Endowment, Inc., a corporation, its officers, agents, servants, employees, and those persons in active concert or participation with it be and they hereby are permanently enjoined and restrained from violating the provisions of section 15(a)(2) of the Fair Labor Standards

Act of 1938, as amended (29 U.S.C. 201 *et seg.*), hereinafter referred to as the Act, in any of the following manners:

I

Defendant shall not, contrary to the provisions of sections 6(d)(1) and 15(a)(2) of the Act, discriminate within establishments in which employees are employed between employees on the basis of sex by paying wages to employees employed in the same establishment at rates less than the rates at which it pays employees of the opposite sex in such establishments for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

II

It is further ORDERED, ADJUDGED, and DECREED that defendant be enjoined and restrained from withholding payment of unpaid wages in the total amount of $20,558.20, which the Court finds to be due under the Act to defendant's employees and former employees named below in the amounts specified:

Name	Dates of Employment	Amount
Regina Antkowiak	10-15-71 to 12-30-73	$ 562.80
Hilma Akins	5-31-70 to 12-30-73	609.50
Susie D. Arriola	5-31-70 to 7-15-72	353.40
Mary Barclay	11-30-70 to 1-15-72	200.20
Doris Barnett Shires	3-15-71 to 12-30-71	119.30
Viola Bennett	9-15-71 to 1-30-72	270.05
Frances Bond	5-31-70 to 2-28-73	546.20
Mario Briano	9-30-73 to 12-30-73	46.40
Sue Burnell	5-31-70 to 8-15-70	36.15
Delfina Carter	5-31-70 to 12-30-70	111.40
Faustina Carrizales	12-15-72 to 12-30-73	212.30

D-3

Name	Dates of Employment	Amount
Verna Carver	11-15-71 to 1-30-72	$ 42.00
Nancy Castanada	5-31-70 to 1-30-72	
	6-15-72 to 12-30-73	597.30
Valeria Cegielski	11-15-73 to 12-30-73	36.20
Gladys Cook	5-31-70 to 12-30-71	291.60
Nellie Corbett	5-31-70 to 12-30-73	657.30
Verna Davis	5-15-71 to 9-15-71	60.90
Alyne Devlin	5-31-70 to 2-28-73	565.30
Luz de Granda	2-28-73 to 12-30-73	156.30
Melissa Elliott	5-31-71 to 4-15-72	489.50
Sybil Edwards	1-31-72 to 2-29-72	12.90
Merle Elliott	5-31-70 to 2-28-71	139.85
Edith Estes	6-15-70 to 7-15-71	197.20
Maggie Faterkowski	12-31-70 to 12-31-73	511.00
Jennie Ferro	5-31-70 to 12-30-72	477.00
Hortencia Flores	9-15-71 to 9-30-71	7.00
Nona French	10-15-71 to 12-30-73	368.30
Modenia Fults	5-31-70 to 6-30-71	197.80
	9-15-70	5.80
Ermelinda Garza	5-31-70 to 11-30-70	58.30
Nellie Glass	5-31-70 to 2-28-73	505.40
Carolina Gonzales (Ramirez)	8-31-70 to 9-15-70	14.00
Pearl Hampton	5-31-70 to 2-28-71	140.70
Mabel Haragan	5-31-70 to 12-30-73	640.60
Mattie Harris	5-31-70 to 7-30-73	569.60
Alaph Heaton	2-29-70 to 10-30-73	298.00
Elidia Hernandez	6-30-71 to 12-30-73	457.00
Ruth Hidalgo	7-31-73 to 8-30-73	8.20
Bertha Holiday	5-31-70 to 12-30-71	286.40
Annie Hundle	10-15-70 to 12-31-73	106.40
Martha Jankowiak	5-19-70 to 2-28-73	453.35
Era Exa Lanier	7-31-70 to 11-30-70	62.40

D-4

Name	Dates of Employment	Amount
Verna Lehde	7-15-70 to 7-15-71	$185.80
Elsie Lehmann	5-31-70 to 1-30-72	303.55
Bertha Lovell	1-31-73 to 12-30-73	175.00
Carmen Magdeleno	5-31-70 to 12-15-73	579.70
Mary V. Martin	5-31-70 to 3-15-71	146.70
Agnes Mauk	8-31-73 to 12-30-73	61.80
Gertrude McKay	5-31-70 to 2-15-71	121.90
Jennie McKay	5-31-70 to 7-15-73	575.20
Eva C. Melchor	8-15-71 to 12-30-73	427.60
Katie Meleski	5-31-70 to 1-30-72 6-15-72 to 12-30-73	586.00
Cartarina Mendez	6-15-71 to 10-30-71	60.10
Jewel Miller	1-31-71 to 8-15-72	177.60
Elizabeth Milsaps	5-31-70 to 7-30-70	49.00
Helen Mixon	3-31-73 to 5-30-73	135.10
Hilda Moers	5-31-70 to 2-28-73	507.10
Peggy Murphree	5-31-70 to 12-30-72	283.60
Stella Muzyka	5-31-70 to 12-30-73	680.30
Susie Nicasio	5-31-70 to 1-30-72	292.40
Helen Nowak	11-15-70 to 11-30-70	5.80
Angelita Ontiverez	2-29-72 to 1-30-73	161.75
Virginia Ortega	10-15-71 to 2-15-72	64.30
Sarah Osgood	9-30-70 to 3-30-71	92.20
Byrtie Owens	5-31-70 to 4-30-73	506.30
Mary Pargac	5-31-70 to 9-30-71	234.10
Mary Pawalowski	5-31-70 to 6-30-72	355.90
Teresa Maria Robles	6-15-72 to 9-15-73	41.65
Shirley Rojas	9-30-72 to 10-15-72	8.15
Pearl Rosales	7-15-71 to 11-15-71	54.70
Graciela Sanchez	4-30-73 to 8-15-73	56.60
Hope Sanchez	5-31-70 to 12-30-73	650.70
Josephine Silvo	5-31-70 to 2-28-71	141.10
Evelyn Spann	5-31-70 to 10-15-71	283.00

Name	Dates of Employment	Amount
Syble Lee Stokes	5-31-70 to 7-30-70	$ 28.70
Martha Stzelecke	5-31-70 to 7-30-70	29.80
Jean Sumrall	5-31-70 to 8-15-71	221.70
Guadalupe Uresti	5-31-70 to 6-30-71	106.10
Imelda Valdes (Montes)	3-15-73 to 12-30-73	144.10
Martha Valdes	7-15-73 to 9-15-73	31.50
Eufracia Vallanveva	4-30-73 to 8-30-73	64.35
Alice (Serrata) Walters	2-29-72 to 6-15-72	44.75
Gladys Warden	5-31-70 to 12-30-72	289.00
Rachel Yeppez	4-30-71 to 12-30-71	112.20
TOTAL		$20,558.20

The provisions of this paragraph shall be deemed satisfied when the defendant delivers to the plaintiff Certified or Cashier's Checks payable to the named employee or former employee in the amounts specified, together with interest computed at the rate of 6% per annum from the dates on which said amounts became due and owing, until paid, less income tax and Social Security withholding on such amounts. Plaintiff shall compute the interest herein ordered to be paid through January 29, 1974, and shall furnish such computations to Defendant, together with a computation of the per diem accrual of interest for the amount due each employee or former employee after January 29, 1974, until paid. Defendant shall compute and withhold from amounts due deductions for income tax and Social Security withholding. The payments provided for herein shall be made within 30 days of the entry of this Judgment or receipt of the interest computations to be made by Plaintiff, whichever is later.

It is further ORDERED that plaintiff, upon the receipt of such Certified or Cashier's Checks from the defendant, shall promptly proceed to make distribution to defendant's employees and former employees named in the above paragraph or to the legal representatives of any deceased person so named, in the amounts indicated, less income tax and Social Security withholding. If, after making a reasonable and diligent effort to distribute such amounts to the persons entitled thereto, plaintiff is unable to do so because of inability to locate a proper person, or because of a refusal to accept payment by any such person, plaintiff, pursuant to 28 U.S.C. Section 2041, shall deposit such Certified or Cashier's Checks with the Clerk of this Court accompanied by a list of each such person's name, last known address, and amount due. Any such Certified or Cashier's Checks may be withdrawn for distribution to the person entitled thereto upon order of this Court.

It is further ORDERED that defendant will pay the costs of this action.

Dated this 26th day of March, 1974.

Carl O. Bue, Jr.
United States District Judge

APPENDIX E

CONSTITUTION

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

29 USCA § 206 (d) (1)

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

APPENDIX G

29 USCA § 215 (a) (2)

§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —

• • • •

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

• • • •

APPENDIX H

29 USCA § 217

§ 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title. June 25, 1938, c. 676, § 17, 52 Stat. 1069; Oct. 26, 1949, c. 736, § 15, 63 Stat. 919; 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F.R. 3174, 64 Stat. 1263; Aug. 30, 1957, Pub. L. 85-231, § 1((3), 71 Stat. 514; July 12, 1960, Pub.L. 86-624, § 21(c), 74 Stat. 417; May 5, 1961, Pub.L. 87-30, § 12(b), 75 Stat. 74.

APPENDIX I

PROVISIONAL AND FINAL REMEDIES — RULE 65

(d) Form and Scope of Injunction or Restraining Order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

APPENDIX J

§ 800.121 Job content controlling.

Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance. For example, the fact that jobs performed by male and female employees may have the same total point value under an evaluation system in use by the employer does not in itself mean that the jobs concerned are equal according to the terms of the statute. Conversely, although the point values allocated to jobs may add up to unequal totals, it does not necessarily follow that the work being performed in such jobs is unequal when the statutory tests of the equal pay standard are applied. Job titles are frequently of such a general nature as to provide very little guidance in determining the application of the equal pay standard. For example, the job title "clerk" may be applied to employees who perform a variety of duties so dissimilar as to place many of them beyond the scope of comparison under the statute. Similarly, jobs included under the title "stock clerk" may include an employee of one sex who spends all or most of his working hours in shifting and moving goods in the establishment whereas another employee, of the opposite sex, may also be described as a "stock clerk" but be engaged entirely in checking inventory. Clearly, the equal pay standard would not apply where jobs require such substantially different duties, even though the job titles are identical. In other situations, including those which exist in the case of jobs identified by the general title "retail clerks", the facts may show that equal skill, effort, and responsibility are required in the jobs of male and female employees notwithstanding they are engaged in selling different kinds of merchandise. In all such situations, the application of the equal pay standard will have to be determined by applying the terms of the statute to the full factual situation.

Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., CLERK

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends (1) that the equal pay provisions of the Fair Labor Standards Act, as added, 77 Stat. 56, 29 U.S.C. 206(d)(1), are inapplicable, since the work performed by its male and female employees was not shown to be substantially identical; (2) that it was denied due process because the district court's injunction was overly broad; and (3) that it was denied due process because the district court ruled against it from the bench.

This action was brought by the Secretary of Labor in the United States District Court for the Southern District of Texas, to enjoin petitioner from violating the equal pay provisions of the Fair Labor Standards Act, *supra*.

The evidence showed that petitioner owned, operated and managed several office buildings in Houston, Texas (A. 2).[1] It employed a number of male and female custodial employees to clean offices, restrooms, corridors and stairwells of the buildings in the evenings. The female custodial employees had responsibility for either cleaning or vacuuming and cleaning. Those who only vacuumed were assigned six floors of a particular office building; they were required to carry vacuums from floor to floor (A. 51).

Those who cleaned and vacuumed ordinarily were assigned two floors (Tr. 29). They were required to vacuum all rugs and spot clean them by hand (A. 34, 35), to dry mop all tiled floors (A. 76, 172), to empty trash cans into a bag attached to a large wheeled supply cart which they pushed from office to office (A. 38, 39, 78), and to spot clean walls, polish doorknobs and desks, dust venetian blinds and clean women's lavatories on each of the assigned floors (A. 73, 76, 164, 172).

The male custodians also had responsibility for vacuuming and cleaning (A. 55, 156; Tr. 243-245, 262-263). Some of them were assigned to vacuum

[1] "A." refers to the joint appendix of the parties in the court of appeals. "Tr." refers to the trial transcript.

only; others to clean and disinfect the men's lavatories (A. 67, 133; Tr. 77, 389); the rest of the male custodians were assigned to clean, scrub and wax tiled floors with the use of adaptable motor-driven machines (Pet. App. C-3).

The female custodial employees were paid $0.10 per hour less than the male custodial employees (Pet. App. C-4).

The district court found that the men and women performed janitorial work which, although not identical, was so "substantially similar" as to meet the Act's "equal work" concept (Pet. App. C-6; A. 20); that use of the machines by some of the male custodial employees required no greater skill, responsibility or effort than that required of female custodial employees in performing their duties (*ibid.*); and that petitioner had not offered "any objective evidence that the duties performed by men as a class required greater effort over a significant period of time than that performed by women as a class so as to justify any wage differential" (*ibid.*). The court concluded that petitioner therefore violated the equal pay provisions of the Fair Labor Standards Act (Pet. App. C-7). It enjoined petitioner from committing further violations and, pursuant to the Act, awarded restitution to certain of the female custodial employees (Pet. App. D-1—D-6). The court of appeals affirmed *per curiam* (Pet. App. A-1).

1. a. Petitioner contends (Pet. 10) that the equal pay provisions of the Fair Labor Standards Act are inapplicable to the instant case, since the district

court did not find that the work performed by male and female custodial employees was "substantially identical." It is well established, however, that the test for determining whether the Act's "equal work" concept is applicable is whether the jobs are closely related and job performance requires "equal skill, effort, and responsibility" and "similar working conditions" (29 U.S.C. 206(d)(1)). See also *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 198-200. Contrary to petitioner's contention, no court that has considered the issue has required that the work to which male and female employees are assigned must be substantially identical before the equal pay provisions are applicable. See *Brennan* v. *City Stores, Inc.*, 479 F.2d 235, 238, n. 8 (C.A. 5); *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490, 493 (C.A. 4); *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (C.A. 3), certiorari denied, 398 U.S. 905; *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 227 (C.A. 7).

In the instant case, although male and female custodial employees were assigned to different duties, their duties were closely related and there is ample evidence supporting the district court's conclusion that their work required equal skill, effort, and responsibility, and was performed under similar working conditions. The evidence showed that both sexes were responsible for cleaning and vacuuming—tasks which required the same kind and amount of physical exertion, which were equally routinized, and which required no particular skills.

b. Petitioner also contends (Pet. 7-9) that the Act does not permit a court to look behind an employer's

job classifications if there is a reasonable basis for them. In the instant case, however, there was no finding that petitioner's classifications were "reasonable" or based upon any factors other than the sex of the employees.[2] Once the Secretary has demonstrated that the work being performed by male and female employees is substantially equal in skill, effort and responsibility, the burden then shifts to the employer to show some factor other than sex which justifies the salary disparity. *Corning Glass Works* v. *Brennan*, *supra*, 417 U.S. at 204. Petitioner failed to meet this burden.

2. Petitioner contends (Pet. 13-18) that it was denied due process because the district court's injunction was not limited to the establishments and employees involved in the litigation. It is well established, however, that an injunction "should operate as an effective deterrent to a repetition of the unlawful conduct" (*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186; *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192-193). A company-wide decree is particularly appropriate where, as here, the violations are shown to be the result of company policy and are found at several separate establishments controlled by the employer (Pet. App. C-1—C-2). See, *e.g.*, *Brennan* v. *J. M. Fields, Inc.*, 488 F.2d 443 (C.A. 5), certiorari denied, 419 U.S. 881; *Tobin* v. *Frost-Arnett Co.*, 13 WH Cases 566, 34 CCH Lab.

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[2] Although the compliance officer stated that there was a "reasonable basis" to "argue" that the jobs were not equal (Pet. 7-8), the Secretary of Labor made no such determination.

Cas. ¶ 71,220 (W.D. Tenn.), affirmed, 264 F.2d 246 (C.A. 6); *Chambers Construction Co.* v. *Mitchell*, 233 F.2d 717, 725 (C.A. 8); *J. P. Stevens & Co.* v. *National Labor Relations Board*, 380 F.2d 292 (C.A. 2), certiorari denied, 389 U.S. 1005; *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Co.*, 408 F.2d 374 (C.A. 5).

The injunction gave petitioner adequate notice of the practices from which it was required to refrain: providing unequal pay to male and female employees whose work requires substantially equal skill, effort, and responsibility. Contrary to petitioner's assertion, the injunction does not expose it to the "risk" of contempt if it incorrectly evaluates job categories not at issue in the instant case; petitioner will "still be able to raise questions of law and of good faith as freely as in the original suit for an injunction" (*Mitchell* v. *Pidcock*, 299 F.2d 281, 287 (C.A. 5)).

3. Petitioner further contends (Pet. 18-19) that it was denied due process because the district court ruled against it from the bench at the conclusion of the evidence. Petitioner assumes that the court's ruling had been reduced to writing prior to the time when petitioner offered the testimony of two witnesses. But the record does not support this assumption; it is just as likely that the court was speaking extemporaneously or from notes taken during the presentation of petitioner's case. Thus there is no reason to suppose that the district court did not accord full and fair consideration to petitioner's evidence.

For the foregoing reasons, it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1975.

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